IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976.

**No. 76-646**

BRADFORD SCHOOL BUS TRANSIT, INC., AND ILLINOIS SCHOOL TRANSPORTATION ASSOCIATION, ET AL.,
*Petitioners,*

*vs.*

THE CHICAGO TRANSIT AUTHORITY, ET AL.,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY AND SUPPLEMENTAL MEMORANDUM FOR PETITIONERS.

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## REPLY AND SUPPLEMENTAL MEMORANDUM FOR PETITIONERS.

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The federal respondents and The Chicago Transit Authority ("CTA") each rely solely upon the same inappropriate rationale in urging this Court to deny the petition. Further, respondents here urge as "issues" various matters which were never pled or raised, either by petitioners or respondents, in the District Court and which were not the basis of the judgment of the Court of Appeals. Respondents' assertion that the doctrine of "primary jurisdiction" is applicable to this case because of alleged questions "concerning the 'adequacy' of transportation that could be provided by private bus operators, the 'reasonableness' of their rates, their 'conformance with applicable safety standards,' and the prior engagement of the subsidized agency in 'schoolbus operations'" (memo for federal respondents, p. 3, memo for

CTA, p. 2) were not the subject of either (1) petitioners' second amended complaint (or any prior pleading), or (2) any pleading filed by the federal respondents or the CTA. Consequently, the response to the petition is based upon matters wholly outside the record.

In the exact same vein is the oblique assertion on behalf of the federal respondents that:

> "We are informed that petitioner Bradford School Bus Transit, Inc., has filed an administrative complaint pursuant to these regulations. This complaint raises the same substantive issues involved here. These pending proceedings offer petitioners a full opportunity to obtain a decision by UMTA concerning the challenged CTA operations. If they should be dissatisfied with UMTA's decision, they then would be free to return to the courts." (memo for federal respondents, p. 3.)

The complaint so referred to was filed in October, 1976, and it dealt with an award of a school bus contract to CTA by the Chicago Board of Education on or about October 13, 1976. That complaint is being prosecuted by four corporations which bid that work as joint venturers. One of those corporations is *one* of the petitioners here. However, petitioner Illinois School Transportation Association is not a party to that proceeding, nor is that proceeding brought on behalf of the class of school bus operators that constitute the class in this case.[1] It approaches arrogance for the government to state, as it does, that that "proceeding" before UMTA might afford Bradford the same relief as that prayed for in the instant case. Among other things, that suggestion ignores the fact that Bradford might well be entitled to an award of compensatory damages below. Additionally, it is somewhat strange for a defendant to dictate to the plaintiffs that they should obtain relief for a wrong that is alleged to have occurred in January, 1975 (Appendix to Petition, pp. A7-A8) on the basis of an alleged wrong in October, 1976.

1. The existence of this "proceeding" was first known to counsel for the petitioners when the government's memorandum was received.



Further, the federal respondents conveniently ignore the fact that the Illinois School Transportation Assocation is a party to this case with an interest to be vindicated here and that it is not and does not intend to be a party to the "proceeding" before UMTA. It would be better that the government face up to the charges in the complaint below rather than suggesting that Bradford somehow obtain the relief there requested through the vehicle of a proceeding that was commenced at least 18 months after the instant case. The government's reliance upon that character of argument, we think, is indicattive of the that character of argument, we think, is indicative of the appropriateness of granting the writ in this case.

To assume at this stage of this case that the asserted questions delineated by respondents, *supra*, p. 1, trigger the application of the doctrine of "primary jurisdiction" is presumptuous. Moreover, the government's explicit suggestion that UMTA presently has administrative "expertise" with respect to such topics is without support in this record or elsewhere. The best evidence of that is the fact that UMTA had not adopted any regulations with respect to such topics until at or about the time this case was argued in the Court of Appeals. The simple fact is that UMTA has not been engaged in regulating or studying school bus operations in the State of Illinois, the safety requirements applicable thereto, or the rates charged for such services. Instead, UMTA has been engaged in distributing federal monies to public mass transportation agencies such as the CTA.

Complementary to respondents' presentation about "primary jurisdiction" is the government's suggestion, at page 2 of its memorandum, that the Court of Appeals referred certain issues to UMTA. No such referral was made; instead, the Court of Appeals affirmed without modification the District Court's order dismissing petitioners complaint with prejudice. For that reason, the respondents' reliance upon certain statements of this Court in *Nader* v. *Allegheny Airlines, Inc.* (memo of federal respondents, p. 2, memo of CTA, p. 3) is at best misplaced, for this

Court was there speaking of the "refer[al] of specific issues to an agency for initial determination" 96 S. Ct. 1978, 1987. Here, no issues have been formulated that can be referred, and in fact there has been no stay of the action pending a referral. Instead, petitioners' complaint has been dismissed with prejudice.

The government's position in this case is at odds with the position it recently assumed in *United States* v. *American Telephone and Telegraph Company, et al.*, No. 74-1698, which is pending in the District Court for the District of Columbia. That case was filed on November 20, 1974, and it is there alleged that AT&T, Western Electric Company, Bell Telephone Laboratories, Inc., and numerous other co-conspirators, conspired to prevent, restrain and eliminate competition in the business of telecommunications and equipment therefor. The breadth of the violations charged and relief requested is evident from the government's press release concerning the commencement of the action. CCH Trade Regulation Reports ¶ 45,074. Apart from typical antitrust relief, the government seeks the divestiture by AT&T of Western Electric, the division of Western Electric into two or more separate, competing companies, and the divestiture by AT&T of its Long Lines Department.

The relevancy of the AT&T case to this petition first became known to counsel for the petitioners, after the filing of the petition, when a news article appeared in the Wall Street Journal on or about November 24, 1976, which reported the district judge's ruling in that case on the question of "primary jurisdiction". For the convenience of the Court, that opinion is reproduced in the supplemental appendix on pages SA 1 through SA 11. That opinion clearly traces the positions of the respective parties on the questions of the exclusive jurisdiction of the FCC over the subject matter of the government's complaint, the alleged implicit repeal of the antitrust laws with respect to the conduct of the defendants, and whether the action was precluded by a prior consent decree. In the course of determining those questions, Judge Waddy, *sua sponte*, raised the question of the

1. See **No. 76-939;** *AT&T* v. *U. S.* filed in this court on January 6, 1977.



applicability of "primary jurisdiction" to the issues raised by the government's complaint and the answer thereto. At the urging of the government,[1] the District Judge held that referral under that doctrine of any issue was premature and that no such referral would be considered until the issues in the case were "more sharply defined through discovery and other proceedings permissable under the Federal Rules of Civil Procedure" (SA 8-10). In short, Judge Waddy completely adopted the government's argument on "primary jurisdiction"—so do the petitioners here.

In *AT&T*, the Department of Justice said:

> "The doctrine of primary jurisdiction applies to claims cognizable by courts when the conduct complained of is also within the special competence of an administrative body. Conversely, it does not apply where such conduct is not within the purview of any regulatory agency." (SA 15.)
>
> * * * * *
>
> " 'No fixed formula exists for applying the doctrine of primary jurisdiction.' *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 64 (1956). The issue to be resolved is simply whether the purposes of the doctrine would be served by its application. Primary jurisdiction referrals may allow courts to obtain agency views on threshold jurisdictional issues or to obtain agency expertise and achieve uniformity through judicial accommodation. Primary jurisdiction is thus a discretionary device to assist in the pragmatic problem of allocating responsibility between courts and regulatory agencies, and to allow the courts to take advantage of regulatory expertise.
>
> "Primary jurisdiction referrals are not to be employed casually. They entail expenditures of agency time and effort and they delay the adjudication of the claim before the court. Thus, as the Court in *Western Pacific* pointed out, 'in every case' it is encumbent upon a court to conclude that it must resolve an issue requiring uniformity of approach or agency expertise prior to ordering a primary

1. Extracts from the brief of the Department of Justice in *United States* v. *ATT*, et al. are reproduced in the appendix hereto at pp. SA 12-20.

jurisdiction referral. 352 U. S. at 64. The Supreme Court, recognizing that 'in virtually every suit involving a regulated industry, there is something of value which an administrative agency might contribute if given the opportunity,' *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. at 320, nonetheless has taken pains to emphasize that the propriety of referrals hinges upon their promising to be of 'material aid' or sufficiently 'helpful' to the referring court to warrant the burdens and delays they inevitably entail.

"Last June, in *Nader* v. *Allegheny Airlines, Inc.*, 96 S. Ct. 1978 (1976), the Court reversed a directive by the Court of Appeals for the District of Columbia Circuit that a common law tort action be stayed pending referral of the matter to the Civil Aeronautics Board. It deemed the standards to be applied 'within the conventional competence of the courts,' and declared that 'the judgment of a technically expert body is not likely to be helpful in the application of these standards. . . . *Id.* at 1988.' (SA 15-16.)

* * * * *

"The problems of delay and burden upon the administrative agency as well as the very rationale for the primary jurisdiction mechanism, *i.e.*, uniformity and expertise, counsel that referrals be limited to specific issues. The authorities reflect this. *Nader* v. *Allegheny Airlines*, 96 S. Ct. at 1987 ('[I]t may be appropriate to refer specific issues to an agency. . . .'); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 68 (1970) ('[C]ourts may route the threshold decision as to certain issues to the agency. . . .').

"Prior to making referrals, a court should assure itself that an *agency resolution* of a specific issue is in fact required for the adjudication of the claim before it. *United States* v. *Western Pacific R. Co.*, 352 U. S. at 64." (SA 17-18.)

* * * * *

"It therefore is premature to attempt to carve out of this case specific issues for referral to the FCC. That task, if necessary, must be deferred until discovery reveals more clearly the dimension of defendants' antitrust misconduct and the extent to which it overlaps with unresolved questions of communications law and policy.



"Further, because of problems of procedure, delay, expense, and inflexibility identified with the formal referral process, the Department believes that the Court should seriously consider obtaining the Commission's assistance, should it appear necessary at all, through some less formal means. This could take the form of an invitation to intervene, *see, e.g., Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 273 (7th Cir. 1970), *cert. denied*, 401 U. S. 994 (1971); participation as *amicus curiae;* or some other less formal means, *see, e.g., United States* v. *Chicago Bd. of Trade*, 1972 Trade Cas. ¶ 73,831 (N. D. Ill. 1972). *See generally Catholic Medical Center* v. *Rockefeller*, 305 F. Supp. 1256, 1268 (E. D. N. Y. 1969), *aff'd*, 430 F. 2d 1297 (2d Cir.), *appeal dismissed*, 400 U. S. 931 (1970); Jaffe, Judicial Control of Administrative Action 130 (1965)." (SA 18-19.)

What the government told Judge Waddy was true. It is still true. Further, that government submission demonstrates the error below, and it also shows the appropriateness of granting a writ of certiorari in this case.

## CONCLUSION.

For the reasons stated, petitioners respectfully pray that this Court's writ of certiorari issue to review and reverse the judgment below.

Respectfully submitted,

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Dated: January 7, 1977.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-646**

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BRADFORD SCHOOL BUS TRANSIT, INC., and ILLINOIS SCHOOL TRANSPORTATION ASSOCIATION, ET AL.,
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## SUPPLEMENTAL APPENDIX.

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## SUPPLEMENTAL APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For the District of Columbia

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|---|---|
| UNITED STATES OF AMERICA, *Plaintiff,* *vs.* AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Defendants.* | Civil Action No. 74-1698 |

### MEMORANDUM OPINION AND ORDER ON JURISDICTIONAL ISSUES.

I.

This action arises under Sections 2 and 4 of the Sherman Antitrust Act, 15 U. S. C. §§ 2 and 4. Plaintiff is the United States of America, acting through the Department of Justice. Defendants are American Telephone and Telegraph Company (AT&T), Western Electric Company, Inc. (Western Electric), a wholly owned subsidiary of AT&T, and Bell Telephone Laboratories, Inc. (Bell Labs), jointly owned by AT&T and Western Electric.

The complaint broadly alleges that defendants, together with numerous co-conspirators, including 23 named telephone companies owned in whole or in part by AT&T, and their subsidiaries (Bell Operating Companies), have engaged in an unlawful combination and conspiracy to monopolize, have attempted to monopolize and have monopolized certain interstate

trade and commerce in telecommunications equipment and submarkets thereof. Plaintiff seeks declaratory and injunctive relief, including complete divestiture of Western Electric by AT&T, divestiture by Western Electric of some of its manufacturing and other assets, and divestiture by AT&T of some or all of its "Long Lines Department" from some or all of the Bell Operating Companies.

The defendants did not move to dismiss the complaint but in their answer to the complaint, they alleged the following affirmative defenses: (1) plaintiff fails to state a claim upon which relief can be granted; (2) the Court lacks subject matter jurisdiction; and (3) the matters sought to be litigated herein were previously litigated in a suit between the parties brought in 1949 in the United States District Court for the District of New Jersey, Civil Action No. 17-49, making the the issues herein *res judicata*, and (4) that in the 1956 consent decree terminating Civil Action No. 17-49, the District Court of New Jersey retained exclusive jurisdiction to modify or terminate that decree.[1]

At a hearing on discovery motions held February 20, 1975, the Court indicated its concern over whether the jurisdictional defenses raised in the answer to the complaint were threshold matters which should be resolved before the expensive and protracted discovery inherent in the nature of this case was undertaken by the parties. The Court then *sua sponte* stayed discovery pending its determination of the jurisdictional questions.

Following extensive briefing and a hearing on July 23, 1975, the Court, on August 5, 1975, invited the Federal Communications Commission (Commission) to participate as *amicus curiae*. The Commission accepted the Court's invitation, submitting an *amicus curiae* brief addressing the jurisdictional issues. Subsequent to the Commission's submission, supplemental memoranda were filed by the Department of Justice and the defendants.

1. By Order dated October 1, 1976, this Court determined: (1) that this action is not barred by the doctrine of *res judicata* because of Civil Action No. 17-49 in the United States District Court for the District of New Jersey; and (2) that the consent decree entered in Civil Action No. 17-49 does not require this Court to relinquish jurisdiction to the New Jersey Court.



Meanwhile, the Commission was engaged in various proceedings and made certain determinations which, it appeared to the Court, embraced some of the same 30 alleged actions and practices pinpointed in Addendum B to the Commission's *amicus* memorandum which it viewed as the basis of plaintiff's Sherman Act monopolization charges.

In light of the *amicus* submissions, and the recent proceedings and determinations by the Commission, the Court, by Order dated October 1, 1976, ordered a further hearing on whether the Federal Commissions Act of 1934, 47 U. S. C. § 151, *et seq.* (the Communications Act), and the regulations promulgated pursuant thereto, compelled the conclusion that there was an implied repeal of the antitrust laws. Also included, of necessity, was further consideration of the extent to which exclusive jurisdiction rested with the Commission, and whether and to what extent the doctrine of primary jurisdiction should be invoked. Supplemental memoranda were filed by the parties and the Commission, and a hearing held November 16, 1976.

Briefly stated, defendants contend they enjoy implied immunity from antitrust liability because they are subject to a pervasive scheme of regulation imposed by the Federal Communications Act and state regulatory statutes. They contend that this pervasive regulatory scheme, based as it is upon the public interest standard, is flatly inconsistent with the competition standards underlying antitrust law. With respect to the question of primary jurisdiction, defendants contend that because the Court has no antitrust jurisdiction herein, the question of primary jurisdiction cannot arise, and would not be an appropriate exercise of discretion in this case. Recent Commission decisions, they assert, represent primarily attempts by the

Commission to control anticompetitive behavior initiated by defendants through tariff filings.

Plaintiff contends that Congressional intent is the standard to be applied, and that in this case, neither an express nor an implied immunity from antitrust liability was intended nor exists. Plaintiff sees absolutely no irreconcilable conflict arising under the Commissions Act and the Sherman Act, and contends that the Commission's regulations and recent decisions in proceedings do not in any way affect the statutory scheme, or the antitrust jurisdiction of this Court.

The Commission, as *amicus*, finds no blanket immunity from antitrust liability. It does, however, assert that the following three areas are impliedly delegated to the Commission's exclusive jurisdiction which antitrust courts should not disturb by *ad hoc* rulings: (1) in view of Section 214 of the Act, only the Commission may require, through its certification process, entry into or exit from a communications common carrier market; (2) in view of Section 201 of the Act, antitrust courts should not countermand Commission orders requiring carriers to interconnect their telephone systems; and (3) in view of Section 205 of the Act, courts should not base antitrust relief or remedies upon tariff provisions or conduct pursuant to tariff provisions which the Commission has either "approved or prescribed" after the required investigation.

The Commission urges the Court to refer unsettled issues which may substantially affect the Commission's regulatory policies to the Commission under the doctrine of primary jurisdiction and to take judicial notice where the Commission has settled such questions, so as to reconcile the regulatory scheme and the scheme of the antitrust laws.

## II.

The Federal Communications Act of 1934 contains no express statement of immunity and defendants do not claim the



Act expressly exempts them from the antitrust laws. Therefore, immunity, if it exists, must be implied from the statutory scheme and the regulatory powers exercised by the Commission.

When faced with implied immunity questions, the courts have undertaken a case-by-case approach which analyzes the particular industry, the appliable regulatory scheme and procedures. and the statutory history to determine whether operation of the antitrust laws can be reconciled with the regulatory scheme. Where reconciliation cannot be achieved, the antitrust laws must give way.

When Congress passed the Communications Act in 1934, it was well aware of the dominance of AT&T of the telecommunications industry inasmuch as AT&T *was* the telecommunications industry.[2] Provisions of older interstate commerce acts were retained, and new provisions incorporated. The stated purpose of the Communications Act is

> ". . . to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . ." 47 U. S. C. § 151.

Common carriers are regulated under Title II of the Communications Act, 47 U. S. C. §§ 201-223. The Commission summarizes its mission with respect to common carriers as follows: "(1) to create and maintain a rapid, efficient communications network; (2) to ensure that adequate facilities are provided for the network; and (3) to require the provision of service pursuant to tariffs offering just and reasonable rates, practices, procedures and regulations."[3] Additionally, the Commission has been granted remedial powers sufficient to ensure compliance with its mandate.

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2. Emphasis added.

3. Memorandum of Federal Communications Commission as *Amicus Curiae*, at 8.

Title II of the Communications Act creates a scheme embodying extensive regulatory control. *United States* v. *Radio Corporation of America*, 358 U. S. 334, 349 (1959). However, nothing in the history of federal regulation of the telecommunications industry, beginning with the Mann-Elkins Act of June 18, 1910, 36 Stat. 539, and the Willis-Graham Act of 1921, 42 Stat. 27, and continuing through the Communications Act of 1934, including its legislative history, compels the conclusion that Congress envisioned immunity from antitrust liability.

Such immunity may, however, still be implied if an irreconcilable conflict between the regulatory statute and the antitrust laws exists. It is upon this theory that defendants chiefly rely. In their view, pervasive regulation by federal and state agencies automatically confers antitrust immunity. Alternative grounds supporting their contention of immunity are based on asserted inconsistent standards embodied within the regulatory scheme and antitrust laws.

The Supreme Court has addressed the issue of implied immunity from antitrust laws on a number of occasions. At the heart of each of the Supreme Court's decisions involving implied immunity from antitrust laws is a strong disfavor to find that the regulatory scheme completely displaces antitrust laws. *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines*, 409 U. S. 363 (1973). This basic principle is particularly true where commercial relationships "are governed in the first instance by business judgment and not regulatory coercion." *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 374 (1973).

The *Otter Tail* Court held that the power company, although subject to extensive regulation by the Federal Power Commission, was not immune from antitrust action under Section 2 of the Sherman Act. Quoting from *United States* v. *Philadelphia*



*National Bank*, 374 U. S. 321, 350-51 (1973), the Court emphasized that

> "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust provisions and regulatory provisions." *Otter Tail Power Co.* v. *United States, supra* at 372.

The Court then went on to observe that "activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Id.*

It is true that a regulatory scheme may be so pervasive that it must displace the antitrust laws in particular and discrete instances. *United States* v. *National Association of Securities Dealers, Inc.*, 422 U. S. 694, 735 (1975). In each instance, however, the concern has been whether different and potentially conflicting standards with respect to particularized activities and conduct may result, thereby threatening the agency's ability to carry-out its regulatory mandate. Immunity is to be implied only where it is necessary to make the regulatory statutes work, and even then only to the minimum extent necessary. *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963).

These basic axioms of construction were recently reaffirmed in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659, 682-683 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

Merely because Congress has authorized the Commission to regulate the telecommunications industry (even assuming that regulation is viewed as being pervasive) does not automatically necessitate the conclusion that the antitrust laws are to be displaced. As Mr. Justice Harlan observed in his concurring opinion in *United States* v. *Radio Corporation of America, supra* at 353:

> ". . . a Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding

> adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee *pro tanto* from the antitrust laws, . . ."

The Court therefore concludes that the Communications Act does not expressly, or impliedly, repeal the antitrust laws. Neither the language, nor the legislative history of the Communications Act supports the conclusion that Congress intended by that Act to grant a total, blanket immunity to defendants from application of antitrust laws, and to place exclusive jurisdiction over all their conduct in the Federal Communications Commission.

The Court further concludes that neither the Act, nor the regulations promulgated pursuant thereto, nor the recent proceedings and determinations by the Commission necessitate or support the conclusion that there has been an implied repeal of the antitrust laws with respect to all of the conduct of defendants embraced within the complaint. The Court is satisfied that it has antitrust jurisdiction of at least some of the aspects of the case.

## III.

Having determined the defendants are not completely immune from the antitrust laws, the Court turns next to the applicability of referral to the Commission under the doctrine of primary jurisdiction.

Primary jurisdiction issues arise in antitrust litigation where, as here, "conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress." *Ricci* v. *Chicago Mercantile Exchange,* 409 U. S. 289, 299-300 (1973).

The procedure typically followed is for the antitrust court to refer preliminary factual and legal questions to the agency while retaining ultimate jurisdiction and "the final authority to expound the statute." *Ricci, supra* at 305, quoting from



*Federal Maritime Board* v. *Isbrandtsen, Co.,* 356 U. S. 481, 498 (1958). The question of immunity, of couse, is not before the agency.

This "prior resort" approach is grounded on the necessity for administrative uniformity and the need for administrative skills found within the appropriate body of experts in handling intricate facts, *United States* v. *Radio Corporation of America, supra* at 346, and grows out of the need to resolve possible conflicts between the antitrust policy of free competition and the regulatory standards. In this case, the regulatory standard is the public interest, convenience and necessity. 47 U. S. C. § 201, 214. However, competition is, without a doubt, a factor to be weighed in determining where the public interest lies. *Hawaiian Telephone Company* v. *F. C. C.,* 498 F. 2d 771, 776 (D. C. Cir. 1974).

Referrals have been used in the past in antitrust suits dealing with communications common carriers as the means of accomodating the overlapping jurisdiction.[4] See, *e.g., United States* v. *Radio Corporation of America, supra; Carter* v. *AT&T,* 365 F. 2d 486 (5th Cir. 1966); *Chastain* v. *AT& T,* 401 F. Supp. 151 (D. D. C. 1975).

As Judge Gasch observed in the *Chastain* case:

> "The purpose of referrals to regulatory agencies pursuant to the doctrine of primary jurisdiction is simply to give the relevant regulatory agency the opportunity to determine the reasonableness and validity of the challenged practice under the regulatory scheme before the Court determines the reasonableness and validity of the practice under the antitrust laws. In this way the primary jurisdiction doctrine seeks to prevent 'sporadic action by federal courts . . . [from] disrupt[ing] an agency's delicate regulatory scheme.'" *Chastain* v. *AT&T, supra* at 157, quoting from

4. The Commission has encouraged the Court to utilize the procedure by means of a precise referral order calling upon the agency to address specific questions under the Communications Act. Supplemental Memorandum of F. C. C. as *Amicus Curiae,* at 5.

*United States* v. *Radio Corporation of America, supra* at 348.

Moreover, when certain basic communications issues arise in antitrust proceedings, the regulatory scheme prescribed in Title II of the Communications Act for common carriers would seemingly make referral to the Federal Communications Commission imperative. *Carter* v. *AT&T, supra* at 498-499.

Accordingly, it appears to the Court, based upon all of the matters that have come before it, including recent Commission activities, that some—or much—of the conduct and practices of defendants upon which plaintiff bases its charges of conspiracy to monopolize, attempts to monopolize and monopolization might well be subject to the doctrine of primary jurisdiction. The Court, in its discretion, will in the future, consider referring particular issues to the Commission at the appropriate time. At this stage in the proceedings, however, the issues must be more sharply defined through discovery and other proceedings permissible under the Federal Rules of Civil Procedure.

## IV.

Defendants, in their answer to the complaint, asserted that the complaint fails to state a claim upon which relief can be granted. With respect to the argument that the complaint is vague, the Court agrees that it is vague. However, the failure of the complaint to set forth specific acts to support its general allegations of antitrust jurisdiction is not sufficient grounds for dismissal since the Federal Rules of Civil Procedure do not require a complainant to set out in detail all of the facts upon which he bases complaint. *Conley* v. *Gibson,* 355 U. S. 41 (1957).

The Rules also provide for a more definite statement, discovery proceedings, depositions, and other pretrial procedures, all of which can add content to the complaint. The Court notes that already allegations of more specific conduct and activity on the



part of defendants have surfaced in plaintiff's various memoranda.

## V.

In summary, inasmuch as neither party has made a motion raising the jurisdictional issues, the Court, *sua sponte,* finds and orders: (1) that defendants do not have blanket immunity from antitrust liability, either expressly or by implication; (2) that the Court has antitrust jurisdiction in this case; and (3) that should it become necessary in the course of these proceedings, the Court will consider the appropriateness of referring certain issues to the Federal Communications Commission under the doctrine of primary jurisdiction.

These determinations and orders shall govern the future course of this litigation unless subsequently changed by order of the Court.

/s/ JOSEPH C. WADDY,
Joseph C. Waddy,
*United States District Judge.*

Dated: November 24, 1976.

UNITED STATES DISTRICT COURT
For the District of Columbia.

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| UNITED STATES OF AMERICA, *Plaintiff,* *vs.* AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Defendants.* | Civil Action No. 74-1698 |

SUPPLEMENTAL MEMORANDUM OF THE DEPARTMENT OF JUSTICE.

## I. INTRODUCTION.

On October 1, 1976 the Court issued a *Memorandum and Order* resolving two of the three jurisdictional questions pending in this matter. The Court set for further hearing the question of whether there is "an implied repeal of the antitrust laws with regard to any or all of the conduct alleged in the Complaint." The Court also set for argument the question, in the event that the FCC does not have exclusive jurisdiction, "whether the Court should refer the complaint to the FCC under the doctrine of primary jurisdiction." Finally, the Court invited the parties to submit supplemental memoranda on "whether, and if so how, the recent decisions and proceedings of the Federal Communications Commission affect the jurisdictional issues posed above." Plaintiff takes this opportunity to comment upon the effect of these recent decisions, as well as certain recent judicial decisions bearing upon these issues.



## II. SUMMARY OF ARGUMENT.

### A. *Exclusive Jurisdiction.*

To dismiss an antitrust suit on the basis of jurisdiction in a federal regulatory agency, a federal district court must assay the regulatory statute and legislative history to determine whether Congress intended the antitrust laws to be supplanted by regulation. Such repeals of the antitrust laws are not lightly implied, and are appropriate only if necessary to make the particular regulatory act work. Obviously, recent actions of the Federal Communications Commission do not change the Communications Act or its legislative history, nor do they contain any heretofore unrevealed insights into whether antitrust immunity for these defendants is necessary to make the Communications Act work.

Recent Commission decisions and proceedings indicate that the FCC is investigating a variety of practices over which it has jurisdiction. Since its founding, the Federal Communications Commission has been involved in many proceedings concerning the industries it regulates. But the jurisdiction of federal courts to entertain antitrust litigation against corporations subject in part to that regulation cannot and does not depend on the state of the Commission's docket at one point in time. Regulation per se does not create antitrust immunity, and there is no indication in these decisions that antitrust immunity is necessary to make the Communications Act work. To the extent recent Commission proceedings are relevant to the jurisdictional issue at hand, they show that even in those areas of conduct which are subject to regulation by the FCC, defendants retain freedom of action too substantial to permit an inference that Congress intended to repeal the antitrust laws.

Finally, while the Commission's recent decisions reflect its attempts to regulate numerous anticompetitive practices of AT&T under the Communications Act, they also demonstrate its

lack of jurisdiction over the conduct of Western Electric and Bell Labs and much of the conduct of AT&T and the Bell operating companies.[1] As described herein, these activities encompass a large proportion of the evidence plaintiff intends to introduce at trial in this litigation.

B. *Primary Jurisdiction Referrals.*

In an effort to accommodate the dual interests of antitrust enforcement and effective regulation, some antitrust courts have, under the doctrine of primary jurisdiction, referred specific issues to regulatory agencies. In the instant litigation, the Department of Justice has alleged a wide range of conduct that together constitutes a violation of the Sherman Act. Much of this conduct is either unregulated or has already been passed upon by the Commission. Although primary jurisdiction referrals of specific issues may be appropriate at some future point, an attempt to identify these issues at this time, prior to discovery, is premature. (Brief of Department of Justice filed November 1, 1976, pp. 1-3)

III. ARGUMENT.

* * * * * *

B. *Primary Jurisdiction.*

The recent decisions of the Federal Communications Commission demonstrate that none of the issues bearing upon defendants' antitrust liability now require referral to the Commission. While defendants have overstated the matter in arguing that

1. The FCC only regulates interstate telecommunications. Approximately half of AT&T's and the Bell operating companies' revenues derive from *intratstate* services, which are regulated, in various ways, by state regulatory commissions. Defendants have claimed that their activities are immune under the doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943). The Court has not asked, and we have not provided, further discussion of this issue.



"the doctrine of primary jurisdiction is totally inappropiate in this case,"[20] the very nature of the case—an encompassing examination of defendants' historical conduct toward actual and potential competitors and the intent underlying that conduct—suggests that no liability issues presently are ripe for referral, and that the Commission's continuing consideration and disposition of important telecommunications issues in the discharge of its own responsibilities under the Communications Act may well obviate the necessity for any such referrals.

The doctrine of primary jurisdiction applies to claims cognizable by courts when the conduct complained of is also within the special competence of an administrative body. Conversely, it does not apply where such conduct is not within the purview of any regulatory agency. Here, the conduct complained of is mixed; the Department has alleged as part of its Sherman Act case conduct clearly regulated by the FCC, and conduct clearly not regulated by the FCC.

"No fixed formula exists for applying the doctrine of primary jurisdiction." *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 64 (1956). The issue to be resolved is simply whether the purposes of the doctrine would be served by its application. Primary jurisdiction referrals may allow courts to obtain agency views on threshold jurisdictional issues or to obtain agency expertise and achieve uniformity through judicial accommodation. Primary jurisdiction is thus a discretionary device[21] to assist in the pragmatic problem of allocating responsibility between courts and regulatory agencies, and to allow the courts to take advantage of regulatory expertise.

Primary jurisdiction referrals are not to be employed casually. They entail expenditures of agency time and effort and they delay the adjudication of the claim before the court. Thus, as

20. Opening Brief for Defendants at 65.

21. *See Natural Resources Defense Council, Inc.* v. *Morton*, 388 F. Supp. 829, 836 n.12 (D. D. C. 1974).

the Court in *Western Pacific* pointed out, "in every case" it is encumbent upon a court to conclude that it must resolve an issue requiring uniformity of approach or agency expertise prior to ordering a primary jurisdiction referral. 352 U. S. at 64. The Supreme Court, recognizing that "in virtually every suit involving a regulated industry, there is something of value which an administrative agency might contribute if given the opportunity," *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. at 320,[22] nonetheless has taken pains to emphasize that the propriety of referrals hinges upon their promising to be of "material aid" or sufficiently "helpful" to the referring court to warrant the burdens and delays they inevitably entail.[23]

Last June, in *Nader* v. *Allegheny Airlines, Inc.*, 96 S. Ct. 1978 (1976), the Court reversed a directive by the Court of Appeals for the District of Columbia Circuit that a common law tort action be stayed pending referral of the matter to the Civil Aeronautics Board. It deemed the standards to be applied "within the conventional competence of the courts," and declared that "the judgment of a technically expert body is not likely to be helpful in the application of these standards. . . ." *Id.* at 1988. Here, of course, it is the federal court and not the administrative agency which is the repository of antitrust expertise. *Thill Securities* v. *New York Stock Exchange*, 433 F. 2d 264, 273 (7th Cir. 1970), *cert. denied*, 401 U. S. 994 (1971).

More recently, the recognition that "the laudable goal of 'judicial accommodation' would become a nightmare of judicial paralysis" if primary jurisdiction referrals to state and municipal agencies were allowed to stand led the Fifth Circuit to over-

22. Dissenting Opinion of Marshall, J.

23. In an effort to minimize these problems, some courts have limited the agency's time to respond. *Macom Products Corp.* v. *American Tel. & Tel. Co.*, 359 F. Supp. 973, 978 (C. D. Cal. 1973); *Monsanto Co.* v. *United Gas Pipe Line Co.*, 360 F. Supp. 1054, 1057 (D. D. C. 1973).



turn a referral order obtained by an AT&T operating company, *Litton Systems, Inc.* v. *Southwestern Bell Tel. Co.*, 539 F. 2d 418 (5th Cir. 1976). In this suit Litton Systems, a manufacturer and marketer of terminal equipment, accused Southwestern Bell of violating the Sherman Act by engaging in tying arrangements and predatory pricing. In measuring the propriety of the referrals sought by Southwestern Bell, Judge Wisdom showed an appropriate concern for the problem of delay. "Bell's effort to seek prior recourse at this stage is not designed to clarify the purpose of such [regulatory] policy nor the need for the arrangement to effectuate that policy; its effect is to serve as a delaying action." *Id.* at 424. Taking cognizance of both the delay problem and the fact that the defendant had not converted its conduct to that of its regulators by merely filing tariffs, Judge Wisdom held that "[a] direction of prior reference here would seriously impair the ability of the district court to enforce federal antitrust policy without providing sufficient countervailing benefits." *Id.* The lack of countervailing benefits sufficient to warrant upholding the referrals was found despite the court's acknowledgement of the agencies' expertise.

> The agencies may, as Bell suggests, be able to call upon expert advice and counsel and may have broad investigatory powers that would aid a court in deciding the antitrust issues. But it can hardly be argued that the court would be incapacitated in the absence of such assistance. In non-regulated industries, a court must be able to decide difficult accounting and economic issues in determining a product was predatorily priced. *Id.* at 424-25 n. 16.

The problems of delay and burden upon the administrative agency as well as the very rationale for the primary jurisdiction mechanism, *i.e.*, uniformity and expertise, counsel that referrals be limited to specific issues. The authorities reflect this. *Nader* v. *Allegheny Airlines*, 96 S. Ct. at 1987 ("[I]t may be appropriate to refer specific issues to an agency. . . ."); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Trans-*

*atlantic*, 400 U. S. 62, 68 (1970) ("[C]ourts may route the threshold decision as to certain issues to the agency. . . .").

Prior to making referrals, a court should assure itself that an *agency resolution* of a specific issue is in fact required for the adjudication of the claim before it. *United States* v. *Western Pacific R. Co.*, 352 U. S. at 64. Where the regulatory agency has made its views known, primary jurisdiction referrals are unnecessary. "Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it." *United States* v. *Western Pacific R. Co.*, 352 U. S. at 69.[23]

Thus, the Commission's recent decisions, as well as earlier ones in the same vein, diminish considerably the likelihood that liability referrals will be necessary. Since many of defendants' anticompetitive practices have been expelled from their tariffs on regulatory grounds, there is no need to refer them to the Commission for purposes of accommodation. In addition, the decisions give this Court the advantage of the Commission's expert views on many of the key issues raised by the Department's Complaint.

At present the Department perceives no liability issues requiring referral. However, the Department cannot responsibly say that liability issues warranting referrals will not arise. Discovery may well make us aware of some. But since the liability aspect of this prosecution has an historical focus, the efforts of the FCC to date have foreclosed many of the questions which, absent such efforts, might have been proper subjects for referral.

23. *See also Locust Cartage Co.* v. *Transamerica Freight Lines, Inc.*, 430 F. 2d 334 (1st Cir.), *cert. denied*, 400 U. S. 964 (1970); *Strickland Transp. Co.* v. *United States*, 334 F. 2d 172 (5th Cir. 1964); *Agar Food Products Co.* v. *Chicago River & Ind. R. Co.*, 358 F. Supp. 1312, 1313 (N. D. Ill. 1973), *aff'd*, 529 F. 2d 529 (7th Cir. 1976); *Schwarz* v. *Bowman*, 244 F. Supp. 51 (S. D. N. Y. 1965), *aff'd mem., Annenberg* v. *Alleghany Corp.*, 360 F. 2d 211 (2d Cir.), *cert. denied*, 385 U. S. 921 (1966).



Further, the continuing efforts of the Commission may well obviate the need for referral of presently unrecognized issues critical to the issue of liability.

It therefore is premature to attempt to carve out of this case specific issues for referral to the FCC. That task, if necessary, must be deferred until discovery reveals more clearly the dimension of defendants' antitrust misconduct and the extent to which it overlaps with unresolved questions of communications law and policy.

Further, because of problems of procedure, delay, expense, and inflexibility identified with the formal referral process, the Department believes that the Court should seriously consider obtaining the Commission's assistance, should it appear necessary at all, through some less formal means. This could take the form of an invitation to intervene, *see, e.g., Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 273 (7th Cir. 1970), *cert. denied*, 401 U. S. 994 (1971); participation as *amicus curiae;* or some other less formal means, *see, e.g., United States* v. *Chicago Bd. of Trade*, 1972 Trade Cas. ¶ 73,831 (N. D. Ill. 1972). *See generally Catholic Medical Center* v. *Rockefeller*, 305 F. Supp. 1256, 1268 (E. D. N. Y. 1969), *aff'd*, 430 F. 2d 1297 (2d Cir.), *appeal dismissed*, 400 U. S. 931 (1970); Jaffe, Judicial Control of Administrative Action 130 (1965).

## IV. CONCLUSION.

For the foregoing reasons, the Court should rule that there is no implied immunity for any of the conduct alleged in the complaint, and withhold any referral to the Federal Communications Commission under the doctrine of primary jurisdiction.

Respectfully submitted,

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(Brief of Department of Justice filed November 1, 1976, pp. 21-27).